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Nos. 93-1002, 93-1018, 93-1019, 93-1061 and 93-1073

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

Creaciones Viviana Ltda., Comercial Estrella Ltda., and Confecciones y Tejidos Nacionales Ltda.,

Petitioners,

v.

United States of America,

Respondent.

Abocasibo Hnos. Ltda.,

Petitioner.

v.

United States of America, and Banco Atlantico.

Respondents.

Comercial Ramora Ltda.,

Petitioner,

v.

United States of America, and Banco Atlantico,

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CONSTITUTIONAL PROVISION, STATUTES AND RULES INVOLVED

FIFTH AMENDMENT

No person . . . shall be deprived of life, liberty or property, without due process of law. . . .

28 U.S.C. 2101(e)

An application to the Supreme Court for a writ of certiorari to review a case before judgement has been rendered in the court of appeals may be made at any time before judgment.

28 U.S.C. § 1291

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . .

Rule 11 of the Supreme Court Rules

A petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgement is given in that case, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to required immediate settlement in this Court.

Rule 12.2 of the Supreme Court Rules

. . . When two or more cases are sought to be reviewed on a writ of cer-

tiorari to the same court and involve identical or closely related questions, a single petition for a writ of certiorari covering all the cases will suffice. . . .

Rule 4 of the Civil Appeals Management Plan, Rules of the Second Circuit, Part C.

Scheduling Order; Contents.

(a) In all civil appeals the staff counsel of the Court of Appeals shall issue a scheduling order as soon as practicable after the pre-argument statement has been filed unless a pre-argument conference has been directed in which event the scheduling order may be deferred until the time of the conference in which case the scheduling order may be entered as part of the pre-argument conference order.

(b) The scheduling order shall set forth the dates on or before which the record on appeal, the brief and appendix of appellant, an the brief of appellee shall be filed and also designate the week during which argument of the appeal shall be ready to be heard.

Rule 5 of the Civil Appeals Management Plan, Rules of the Second Circuit, Part C.

Pre Argument Conference; Pre-Argument Conference Order.

(a) In cases where Staff Counsel may deem this desirable, the staff counsel may direct the attorneys to attend a pre-argument conference to be held as soon as practicable before Staff Counsel or a judge designated by the Chief Judge to consider the possibility of settlement, the simplifications of the issues, and any other matters which the staff counsel determines may aid the handling or the disposition of the proceeding.

(b) At the conclusion of the conference the Staff Counsel shall enter a pre-argument conference order which shall control the subsequent course of the proceeding.

Rule 3 of the of the Guidelines for the conduct of Pre-argument conference under the Civil Appeals Management Plan, Rules of the Second Circuit, Part D.

Good Faith and Non-Coerciveness

The parties are obligated to participate in good faith with a view to resolving differences as to the merits and issues. This process requires each attorney, no matter how strong the att-

orney's views, to exercise a degree of objectivity, patience and cooperation that will permit the attorney to make a decision based on reason. In this process the Staff Counsel, who provides objective expertise in a forum for appraisal of the merits and expedition of each appeal, is entitled to their respect and the Staff Counsel's views should be carefully considered. The Staff Counsel's views, however, are Staff Counsel's own and not those of a the court, with which Staff Counsel does not communicate about a case. If, after this procedure, attorneys believe in good conscience they cannot reach an agreement, they are not under any compulsion to do so.

Rule 8 of the of the
Guidelines for the conduct of
Pre-argument conference
under the Civil Appeals
Management Plan, Rules of
the Second Circuit, Part D.

Any grievances as to the handling of any case under the CAMP program should be addressed to the Circuit Executive, Steven Flanders, Room 1803, who will hold them confidential on behalf of the Circuit Court of Appeals unless release is authorized by the complainant.

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Comercial Samora Ltda.,

Petitioner,

v.

United States of America, and Banco Atlantico,

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Industrias Marathon Ltda.,

Petitioners,

v.

United States of America, and Manufacturers Hanover Trust Company,

Respondents.

Manufacturera del Atlantico Ltda., and Manufacturas Internacionales Ltda.,

Petitioners,

v.

United States of America, and Manufacturers Hanover Trust Company,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT REPLY TO BRIEFS IN OPPOSITION

DISCUSSION

Petitioners Manufacturers Del Atlantico Ltda., Industrias Marathon Ltda., Abuchaibe Hnos. Ltda., Manufacturas Internacional Ltda., Comercial Samora

Ltda., Creaciones Viviana Ltda., Comercial Estrella Ltda., Confecciones Y Tejidos Nacionales Ltda. (hereinafter the "Atlantico Group"), were all claimants in the civil in rem forfeiture action United States v. Johnny Daccarett, 801 F.Supp. 984, 6 F.3rd 37 (2d Cir. 1993) (hereinafter "All Funds Case").

Based on District Court Judge Jack B. Weinstein's (hereinafter Judge Weinstein), use of the "relation back doctrine," in the All Funds Case (App-48a to 51a)[1], to hold inapplicable the provisions of the Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510 et seq. and §§ 2701 et seq., (hereinafter "ECPA"), and thus deny the motion

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[1]"App. " references are to the section and page number in the Appendix. "Lod. " references are to the page number in the Lodging filed and submitted with these Petitions.

under 18 U.S.C. §§ 2515 and 2518(9), to exclude as evidence all in transit, or held in computer storage for less than 180 day,[2] electronic fund transfer communications obtained by the Government without a search warrant issued under the Federal Rules of Criminal Procedures, the Atlantico Group did not succeed in the prosecution of their claims for return of their respective intercepted and seized electronic funds transfers; and in the prosecution of their counterclaims for damages against the United States (hereinafter "the Government") under 18 U.S.C. §§ 2520 and 2707-(a), because of the Government's procuring of the interception of in

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[2]For purposes of exclusion under 18 U.S.C. § 2515, under the ECPA an in transit electronic communication includes any electronic communication held for less than 180 days in computer storage 18 U.S.C. § 2702(a).

transit electronic funds transfer communications in violation of 18 U.S.C. § 2510 and 2511(1)(a) and (c), through the placing of "stop ques" in the computer modems of Banco Atlantico, The Bank of New York and Manufacturers Hanover Trust Co. (hereinafter "the Intermediary Banks");[3] and the Government's obtaining from the Intermediary Banks, all electronic funds transfer communications which had gone to the Republic of Colombia, and were in computer storage for less than and more than 180 days, without either a search warrant being issued

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[3]The Intermediary Banks collaboration in the warrantless searches of all wire transfers going to the Republic of Colombia, is the classic example of the "T" that the Court in United States v. Andonian, 735 F. Supp. 1469, at 1472(C.D. Cal. 1990), was discussing when it said that, "[c]ongress' view of interception can be described as a perpendicular concept, where the interception of a communication crosses its path like the trunk of a `T'."

under the Federal Rules of Criminal Procedure, or an administrative warrant issued with notice, in violation of 18 U.S.C. § 2703(a) and (b).[4]

Furthermore, again based on Judge Weinstein's use of the "relation back doctrine," the Atlantico Group complaint for damages under a separate civil action under the ECPA against the Intermediary Banks in Manufacturas International, Ltda., v. Manufacturers Hanover Trust Co., and Consolidated Cases, 792 F.Supp. 180 (E.D.N.Y.), appeal withdrawn pending final decision in All Funds Case, No. 92-7360 (2d Cir. 1992) (hereinafter the "Consolidated Bank Case"),

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[4]The DEA Report, dated August 20, 1990, (Government bate stamp 000001), submitted during the All Funds Case trial, shows that the providing of notice was prohibited.

was dismissed (App-50d), and all discovery, including on the issues of "interception" and "good faith" was denied.

I. **THE ATLANTICO GROUP'S PETITION BASED ON 28 U.S.C. § 2101(e) AND RULE 11 AND 12.2 OF THE SUPREME COURT RULES, IS A PROPER REQUEST FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION BECAUSE THE SECOND CIRCUIT'S USE OF THE DISTRICT COURT'S DECISION IN THE CONSOLIDATED BANK CASE AS RES JUDICATA, WHEN THEY REPEATEDLY DENY REINSTATEMENT OF THIS PENDING APPEAL IS A VIOLATION OF THE ATLANTICO GROUP'S RIGHT TO DUE PROCESS, RIGHT TO APPEAL UNDER 28 U.S.C. § 1291, AND THE SECOND CIRCUIT'S OWN CIVIL APPEALS MANAGEMENT PLAN.**

On February 24, 1994, the Second Circuit issued its decision in Organizacion J.D. Manufacturas J.D. Ltda. v. U.S. Dept of Justice, the Drug Enforcement Administration, Banco Atlantico, S.A. and the Bank of New York, appeal docketed, No. 93-6019 (2nd Cir. 1993)

(hereinafter the "Intermediary Bank Case").[5]

The above decision violates the Atlantico Group's right to due process because:

(a) although the Second Circuit did remand to Judge Weinstein the claim against the Government under 18 U.S.C. § 2707(a), it denied the claims against the Intermediary Banks based on the non-reviewed holding of Judge Weinstein in the Consolidated Bank Case, which the Second Circuit uses as res judicata, although refusing to reinstate the Atlantico Group's perfected pending appeal;[6] and,

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[5]Notice of this decision arrived on March 2, 1994. Separate Supplemental Briefs under Rule 15.7, are being prepared for submission.

[6]The Second Circuit likewise used the Consolidated Bank Case, as res judicata in the All Funds Case, although refusing the motions in

(b) in denying the claim for damages under 18 U.S.C. § 2520, the Second Circuit not only de facto affirms Judge Weinstein's use in the Consolidated Bank Case (App-50d), of the "relation back doctrine," to bar any discovery of the Intermediary Bank on their use of "stop ques" in their computer modems which intercepted the in transit electronic fund transfers, but also again uses the Consolidated Bank Case, as res judicata on the issue of "good faith."[7]

Despite these clear violations of due process, and the abuses of legal

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November, 1992, to reinstate and consolidate the two appeals.

[7]The issue of the claim "good faith," must be remanded to permit discovery based on K/S Norman Agathe v. Sea Trade & Construction, 767 F.Supp. 60 (S.D.N.Y. 1991), where not only did the Beneficiary Bank notify every interested party of the electronic fund transfer communication of the in rem action, but also of the hearing on ownership.

logic in using the doctrine of res judicata when an appeal is pending, the Intermediary Banks would continue to argue that the Court does not have jurisdiction to hear the Consolidated Bank Case, because this appeal is no longer "pending" due to Staff Counsel Frank Scardilly's (hereinafter "Staff Counsel Scardilly") decision that the Stipulation entered into between the parties withdrew the Consolidated Bank Case appeal, pending all appeals in the All Funds Case, including the filing of a Petition for Writ of Certiorari.[8]

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[8]A Petition for Certiorari is not an appeal as of right, but is discretionary; and this Court has rejected the use of the "relation back doctrine" as used in the Consolidated Bank Case, See United States v. A Parcel of Land, Building, Appurtenances and Improvements, Known as 92 Buena Vista Avenue, Rumson, New Jersey, et al., 113 S.Ct. 1126 (1993) (hereinafter "Buena Vista").

A cursory review of the essential facts involved in the challenged Stipulation, will show that Staff Counsel Scardilly's decisions not only violate due process but is also contrary to the Second Circuit's own operating rules:

(i) the Stipulation was entered into in accordance with Rule 3 of the Guidelines for Conduct of Pre-Argument Conference under the Civil Appeals Management Plan (hereinafter "Management Plan"), on April 24, 1992, after a long and heated conference held by Staff Counsel Scardilly, where Petitioners' vehemently refused to withdraw their appeal in the Consolidated Bank Case;

(ii) it was Mr. Scardilly who was responsible for assuring that the Settlement was a good faith reflection of the position of the parties;

(iii) it was Staff Counsel Scardilly who inserted the handwritten clause in the Stipulation, which Mr. Scardilly later used to deny the Atlantico Group's motions to reinstate on June 26, 1992, November 3, 1992, and October 14, 1993.[9]

Based on these facts, the Atlantico Group argues that Staff Counsel Scardilly's decisions allegedly under the Management Plan, to not reinstate this pending appeal, was both unreasonable and a violation of due process and the Atlantico Group's right to appeal 18 U.S.C. § 1291.

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[9]Based on the Second Circuit's Management Plan the views of the Staff Counsel were not to be transmitted to the Court, and the Atlantico Group was to have been provided an opportunity to have an impartial review of Staff Counsel Scardilly's handling of their case.

In Ortega-Rodriguez v United, 113 S.Ct. 1199 (1993), where the Court restricted the use of the "fugitive disentitlement doctrine" to deny a right of appeal, the Court stated that,

> "[o]ur review of rules adopted by the courts of appeals in their supervisory capacity is limited in scope, **but it does demand that such rules represent reasoned exercise of the court's authority.**" Ortega at 1205 (Emphasis added).

In Chief Justice Rehnquist, Justice O'Conner, Justice Thomas, and former Justice White, dissent, they too stated that,

> [i]t is beyond dispute that the courts of appeals have supervisory power to create and enforce "procedural rules governing the management of litigation." Thomas v. Arn, 474 U.S. 140, 146, 106 S.Ct. 466, 470, 88 L.Ed.2d 435 (1985). **The only limit on the authority is that the rules may not violate the Constitution or a statute, and must be reasonable in light of the concerns they are designed to address.** Ortega at 1210 (Emphasis added).

Consequently, in order to determine whether or not jurisdiction exist under the 28 U.S.C. § 2101(e), and Rule 11 and 12.2 of the Supreme Court Rules, the Court must consider whether the Second Circuit's refusal to reinstate the Consolidated Bank Case appeal based on the interpretation of the Stipulation given by Staff Counsel Scardilly entered under the Management Plan, is unreasonable and conflicts with the Atlantico Groups rights to have its perfected pending appeal in the Consolidated Bank Case heard under 28 U.S.C. § 1291, and the Fifth Amendment.

II. THE CONSOLIDATED BANK CASE CONCERNS ISSUES OF IMPERATIVE PUBLIC IMPORTANCE BECAUSE THE SECOND CIRCUIT HAS DEFIED THE CLEAR INTENT OF CONGRESS AS EXPRESSED IN THE ECPA, AS WELL AS THE PROTECTION OF THE FIFTH AMENDMENT.

In Chevron U.S.A., Inc., v. National Resources Defense Counsel, 104 S.Ct. 2778 (1984), the Court stated that in deciding a federal question, the first issue a court must determine is whether Congress has directly spoken to the precise question at issue, and if it is determined that,

> "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." id. at 2781.

Despite this bench mark, the Second Circuit refused to find as a matter of law in the Consolidated Bank Case, the All funds Case, and the Intermediary Bank Case:

(I) that 18 U.S.C. § 2516(3), permits the Government's law enforcement officials to obtain the information in electronic communication in transit only if a court order has been issued under the Federal Rules of Criminal Procedure; and,

(II) in the Consolidate Bank Case, and the All Funds Case, but not in the Intermediary Bank Case[10], that 18 U.S.C. § 2703(a) and (b), permit the Government access to stored electronic communication for: (i) 180 or less only if the Government has obtained a search warrant issued under the Federal Rules of Criminal Procedure; and, (ii) for stored electronic communication messages for more than 180 days, only if the Govern-

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[10]As noted above the Second Circuit remended this issue to Judge weinstein for further consideration.

ment has acquired either: (1) a search warrant issued under the Federal Rules of Criminal Procedures, (2) or a federal administrative subpoena issued with notice to the designated recipient of the communication.[11]

In fact despite the Second Circuit's holding in the All Funds Case, it has been reported,[12] that the Government has begun to promulgate regulations that permit the interception of in transit electronic communication only after the Government has obtained the required

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[11]See §19.5, at p. 372 through 399, The Law of Electronic Commerce, Benjamin Wright, Little, Brown and Co. (1991)

[12]Newsweek, "Bottom Line" page 31, February 14, 1994, The FBI Monitors the Info Highway.

court order issued under the Federal Rules of Criminal Procedure.[13]

Thus it is indisputable that Congress did specifically amend Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 et seq., by enacting the Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510 et seq. and §§ 2701 et seq., (hereinafter "ECPA"), to limit the Government access to electronic communications in transit and in computer storage as Petitioners have argued in both the District Court and the Court of Appeals since 1990.

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[13]Other recent news articles too numerous to cite in this Reply, as well as the Government's current regulatory efforts, and the Government's policy statements as enunciated by the Clinton Administration regarding "privacy" on the "Information Super Highway," underscores the imperative public importance of the issue now before the Supreme Court.

In summary, Petitioners have established that unauthorized interception and search did occur, through both the Government and the Intermediary Banks own admission.[14] Thus the Consolidate Bank Case and the All Funds Case, must be reviewed with the Intermediary Bank Case, and all three actions be remanded to Judge Weinstein for consideration of the alleged violations of the ECPA.

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[14]The Intermediary Banks admit they failed to comply with the instructions contained in every third party transfer going to the Republic of Colombia, including those of the Atlantico Group, based only on the verbal instructions from the United States Attorney for the Eastern District of New York and general self executing in rem warrant, (Banks Br. at 3, 4). Furthermore, the Government admits that, "[h]ere the government did not intercept the EFT transmission while they occurred, but instead simply directed the intermediary banks not to credit the EFTs to the Colombian corresponding banks." (Gov't Br. at 12). Although this latter admission is an excellent example of sophistry, it does not obscure the reality that this in fact was the procuring of the interception prohibited under 18 U.S.C. § 2511(1)(a) and (3)(a).

III. THE INTERMEDIARY BANKS WERE ACTING AS AGENTS OF THE GOVERNMENT, NOT THE COURT, WHEN THEY PLACED "STOP QUES" IN THEIR COMPUTER MODEMS, AND PERMITTED SEARCHES OF ALL ELECTRONIC FUND TRANSFER COMMUNICATIONS IN TRANSIT AND IN COMPUTER STORAGE GOING TO THE REPUBLIC OF COLOMBIA, BASED ONLY ON A GENERAL IN REM ADMIRALTY WARRANT AND VERBAL ORDERS OF MESSRS. HUI AND BROWN.

In both the All Funds Case, and the Intermediary Bank Case, the Court of Appeals affirmed the Judge Weinstein's denial of all discovery on all issue relating to the alleged interception and disclosure of information in computer storage (Lod. 15 and Lod. 18), and good faith, and dismissed the complaints based on its use of the "relation back doctrine," prior to final judgment based on the Consolidated Bank Case, which the Second Circuit refuses to reinstate. However, this use of the "relation back doctrine," was rejected in Buena Vista.

As noted above this based on due process these holdings must be reviewed by the Court as requested by the Atlantico Group.

CONCLUSION

Based on the above, the Petitions of the Atlantico Group for writ of certiorari should be granted in accordance with 28 U.S.C. § 2801(e) and Rule 11 of the Supreme Court Rules.

Respectfully submitted,

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